

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**Determination of Royalty Rates and
Terms for Making and Distributing
Phonorecords (*Phonorecords IV*)**

**Docket No. 21–CRB–0001–PR
(2023–2027)**

**ORDER ON AMAZON’S AND SPOTIFY’S MOTION TO COMPEL COPYRIGHT
OWNERS TO PRODUCE DOCUMENTS ABOUT PURPORTED NEW REBUTTAL
BENCHMARKS (eCRB No. 26689)**

On May 24, 2022, Amazon.com Services LLC and Spotify USA, Inc. (Services) filed a motion requesting that the Judges compel Copyright Owners to produce documents related to the license agreements Copyright Owners discuss in their Written Rebuttal Statement (WRS) (eCRB No. 26689). Copyright Owners filed an Opposition on June 8, 2022. Amazon and Spotify filed a reply on June 15, 2022.

In the Motion, the Services request that the Judges compel Copyright Owners to produce documents related to foreign licensing agreements and the [REDACTED] that, according to the Services, Copyright Owners belatedly invoke as benchmarks in their WRS. Motion at 1. The Services note that Copyright Owners did not cite any of these licenses in their direct submission and the Services sought, unsuccessfully as it turned out,¹ to strike such testimony.

According to the Services, unless and until the Judges strike such testimony, the Services are entitled to a full evidentiary record about these agreements, including evidence and analysis to determine the true economic value of the transactions. *Id.*, quoting *Web V* Final Determination at 33-34, Docket No. 19-CRB-0005-WR (2021-25) (July 22, 2021). According to the Services, Copyright Owners have issued a near-blanket refusal to produce documents related to the foreign license agreements. Motion at 2. As for the [REDACTED], the Services represent that Copyright Owners have tentatively agreed to produce only documents assigning specific monetary value to the contract terms, but have not produced any such documents. The Services represent that Copyright Owners have refused to produce other substantive analysis of the licenses, including documents about [REDACTED]. *Id.* In particular, the Services seek discovery with respect to Rebuttal Requests 33-36, 38, 40-46, and 48-49 (relating to Copyright Owners’ rebuttal testimony about foreign licensing agreements). The Services contend that the documents and information they seek with respect to these

¹ Order Denying Amazon’s Motion to Strike Testimony Concerning the [REDACTED] (June 23, 2022) and Order on Services’ Motion to Strike Bebawi Rebuttal Testimony (June 16, 2022).

requests are directly related to Antony Bebawi's written rebuttal testimony (WRT) about Sony's European licenses. Motion at 5-6, 9-11. The Services also contend that Rebuttal Requests 105-108 are directly related to Copyright Owners' rebuttal testimony about the [REDACTED]. *Id.* at 12-13 (citing rebuttal testimony of Mr. Kokakis and Dr. Eisenach and declaration of Mr. Duffett-Smith).

In their Opposition, Copyright Owners contend that the Motion is based on a false premise that the Services are entitled to the discovery they seek because Mr. Bebawi's WRT offered European streaming license agreements as benchmarks and the WRT of Jeffrey Eisenach and UMPG's Mr. David Kokakis offered the [REDACTED]

[REDACTED] as benchmarks. Opposition at 1. According to Copyright Owners, neither was offered as a benchmark, but rather was offered, primarily, to rebut Professor Marx's Prime Music benchmark in her amended written direct testimony (WRT) and James Duffett-Smith's WRT. *Id.* at 1-2. From Copyright Owner's perspective, the Services have all of the evidence they need related to this rebuttal evidence because they have the European agreements that Mr. Bebawi testified to and Mr. Duffett-Smith knew of [REDACTED], which he referenced in exhibits to his WDS. *Id.* at 2. Copyright Owners also contend that the Services' requests are overbroad, seeking agreements and documents that have nothing to do with Mr. Bebawi's testimony or the [REDACTED]. *Id.* at 3, referencing agreements reached in Japan, Australia, New Zealand, and Canada, which no witness testified about and which are already in the Services' possession. *Id.*

In their reply, the Services argue that in their rebuttal testimony, Copyright Owners cite the foreign licensing agreements and [REDACTED] as evidence of market negotiations in which services willingly agreed to pay higher rates, which, from the Services' perspective, is the quintessential definition of a benchmark. Reply at 1-2. The Services further contend that, in any event, when a rebuttal witness testifies about license agreements, there is no further requirement that the license be a proposed benchmark for discovery to be appropriate. *Id.* at 2. According to the Services, the test is whether the documents sought are "directly related" to Copyright Owners' WRS, which they clearly are. *Id.*, 17 U.S.C. § 803(b)(6)(C)(v).

Ruling

The Judges have reviewed the parties' arguments and conclude that the Services' requests are directly related to Copyright Owners' WRS to the extent that they are limited to agreements referenced in the WRT of Dr. Eisenach, Mr. Bebawi, and Mr. Kokakis, and the declaration of Mr. Duffett-Smith. As such, the documents and information Amazon and Spotify request are properly discoverable. The requests are otherwise overbroad and irrelevant. Therefore, the Motion is granted as it relates to the above-mentioned testimony and declaration and otherwise is denied as overbroad and irrelevant to the matters addressed in this proceeding.

Within ten days of the date of issuance of this Restricted Order, the affected parties shall file an agreed redacted version for public viewing.

SO ORDERED.

David
Shaw

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David Shaw
Date: 2022.08.03
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David P. Shaw
Chief Copyright Royalty Judge

DATED: August 3, 2022